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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 450

ELIZABETH E. NORRIS,
Defendant and Appellant,
vs.
RALPH A. NORRIS,
Plaintiff and Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States of America:

Your petitioner, Elizabeth E. Norris of the City of Royal Oak, County of Oakland and State of Michigan respectfully petitions the Court for Writ of Certiorari.

(a) Attached hereto and made a part of this petition is the opinion in the above entitled cause by the Michigan Supreme Court in the January of 1955 term of Court

together with a denial of rehearing in the above cause entered June 9, 1955.

(b) The defendant herein filed with the Wayne Circuit Court a petition to set aside the decree of divorce hereto entered April 18, 1929. Said petition was filed with said Court in the County of Wayne and State of Michigan June 25, 1951. That the reason set forth in said petition alleges the plaintiff was a mentally incompetent person at the time the decree of divorce was entered and at the time his bill of complaint was filed, a fact of which the Wayne Circuit Court in Michigan was aware of by virtue of a report filed by the Friend of the Court after a very thorough investigation and a fact which the defendant was unaware of until a great many years after the entry of this decree of divorce all of which is in violation of the 5th Amendment of the Constitution of The United States. This defendant being deprived of her rights without due process of law.

1. The opinion of the Michigan Supreme Court was entered during the January, 1955 term of Court and the denial for a rehearing was entered by the Michigan Supreme Court on June 9, 1955.

2. Fifth Amendment of the Constitution of The United States of America has been violated in that the granting of the decree of divorce by a Court with full knowledge of the fact that plaintiff and appellee had been committed to an institution, the fact which was not within the knowledge of this defendant and appellant until some years later abridged and took from this defendant the rights guaranteed her under the 5th Amendment of the Constitution of The United States of America.

(c) That in January, 1928 the plaintiff and appellee while residing in the State of Arizona was committed to

a mental institution by a Court of competent jurisdiction in the County of Santa Cruz, State of Arizona. That the plaintiff was institutionalized and remained in said institution until June 22, 1928 at which time he was sent to the State of Ohio with an attendant, not discharged as cured, and placed in the custody of his brother who was a resident of the State of Ohio. That on October 19, 1928 the plaintiff herein filed a bill of complaint for divorce and under the laws of the State of Michigan, not having first obtained a restoration of his sanity, he was without right or authority to institute an action in any of the several Courts of the State of Michigan. That the statutes of the State of Michigan being Compiled Laws of The State of Michigan for the year 1915, section 12379 which reads as follows:

> "Whenever an infant, or a person who is insane or otherwise mentally incompetent shall have a right of action, he shall be entitled to maintain a suit thereon, but before the declaration or bill of complaint is filed or any process issued in the name of such person who is sole plaintiff, the circuit judge or circuit court commissioner of the same county shall appoint a competent and responsible person to appear as next friend for such plaintiff who shall be responsible for the cost of suit and the order for such appointment shall be forthwith filed in the office of the clerk of the court in which said action is to be begun. But in case such plaintiff has a guardian of his estate, it shall be competent for such guardian to bring such action."

In the case of *Stevens v. Stevens,* 266 Mich. page 466, the Court held:

> "An insane person in the absence of statute, cannot bring an action for divorce either in his own name or in the name of his guardian."

The settled law holds that divorce proceedings commenced by an insane person are absolutely void, not voidable.

In *Bradford v. Abend,* 89 Ill. 78, page 81, the Court held:

> "Being insane, she could give no consent to the proceedings had in the divorce case, and hence everything done in her name was invalid."

The principle of law is clearly set forth in *27 Corpus Juris Secundum, Divorce,* page 812:

> "A divorce decree granted by a court without jurisdiction of the subject matter of the person is void and should be set aside irrespective of the question of fraud."

In *27 Corpus Juris Secundum,* Section 89, the law is clearly set forth as follows:

> "The remedy of divorce is persoal, and the right to sek it belongs to only the one or the other of the spouses."
>
> "Unless authorized by statute, the divorce suit cannot be prosecuted in behalf of an insane plaintiff by his legal representatives." (Citing *Stevens v. Stevens, supra.*)
>
> "Jurisdiction of divorce is not within the original cognizance of courts of equity, and is purely statutory." (*Haynes,* 25, Mich. 138.)
>
> *Baugh v. Baugh,* 37 Mich. 59;
> *Judsan v. Judsan,* 171 Mich. 185;
> *Kutchai v. Kutchai,* 233 Mich. 569;
> *Toth v. Toth,* 242 Mich. 23;
> *Herb v. Herb,* 254 Mich. 33.

In the case of *Jackson City Bank and Trust Company v. Frederick,* 271 Mich. page 538, the Court held:

"Courts which have jurisdiction over divorce proceedings of the subject matter and of the parties and proceed to a final decree, necessarily have to find all jurisdictional facts necessary to sustain that decree."

"Mistaken assignments of jurisdiction by Court which has undoubted jurisdiction is not void and although it may be subject to a direct attack on appeal it is not open to collateral attack, but when there is want of jurisdiction over the parties or the subject-matter, any action by the Court is void and its proceedings may be questioned collaterally as well as directly."

"Good faith, as well as sound public policy, demands that erroneous and voidable judgments be set aside and modified in the Courts in which rendered."

Michigan has no statute permitting an insane person to apply for divorce and under the provisions of the cases above cited, unless there is a statutory provision permitting such divorce they must necessarily be construed as void.

(d) The Michigan Supreme Court in its opinion took the Arizona revised code 1928, chapter 35, section 1769 (Arizona code annotated 1939, article 3, section 8-301) the Michigan Supreme Court further in its opinion said that the plaintiff was discharged from said hospital June 22, 1928 as improved and allowed to return to Ohio (Michigan?) Arizona revised code 1928, chapter 70, section 2935 (Arizona code annotated 1939, article 2, section 8-203). It is the contention of the defendant herein that the Arizona revised law was not in effect on June 22, 1928, the same being effective July 1, 1929, therefore knowing that the act was not effective and not being retroactive had no application as far as this particular case was con-

cerned. Act 1769 for the year 1913 Arizona statutes would be the only law applicable to a situation of this kind for the reason that Arizona Revised Code 1928 was not effective and not revised until July 1, 1929.

On May 4, 1951, a petition was filed on behalf of the defendant to vacate the aforementioned Decree of Divorce and a duplicate petition was filed on June 25, 1951. An order of Reference for the taking of testimony before the Friend of the Court was entered on August 29, 1952, by the Honorable Thomas F. Maher, successor to Judge DeWitt H. Merriam, and on September 30, 1952 an order appointing the Friend of the Court Guardian Ad Litem was entered. An appearance by the Guardian Ad Litem was filed on October 14, 1952, and a further appearance and intervention by the Attorney General on October 21, 1952.

The defendant, Elizabeth E. Norris, filed a petition to set aside the decree on the grounds that the plaintiff, Ralph Norris, had been declared mentally incompetent at the time the divorce was granted and that she, the defendant was not aware of this fact until after the granting of this decree. That this information came to her six weeks prior to filing the petition to set the decree aside.

The petition to set aside the decree was heard by the Friend of the Court's office, their recommendation submitted to the Circuit Court and on such recommendation the Circuit Court denied the petition. The question of the denial of the petition to set aside the decree was appealed to the Michigan Supreme Court and said Michigan Supreme Court entered an opinion, copy of which is attached hereto, denying said petition. The defendant then filed a petition for a rehearing which was denied by the Michigan Supreme Court on June 9, 1955.

In *27 C. J. Equity,* Section 713:

> "Where, however, plaintiff comes into equity not for the creation * * * of an executory right, but for the mere protection of an executed or vested right, the doctrine of laches has little, if any, application."

The defendant feels herself aggrieved by virtue of the decision of the Michigan Supreme Court and cites as a reason why the Writ of Certiorari should be granted is that the Michigan Supreme Court states that the record does not support appellant's claim that the plaintiff was a mentally incompetent person at the time the bill for divorce was filed or when the decree was entered. On page 14 of the record on appeal to the Michigan Supreme Court there is a letter from the Arizona State Hospital which covers pages 14, 15, 16, 17, 18 and 19 of said record which clearly indicates and supports the contention that the Wayne County Court had knowledge of the fact that the man known as Ralph A. Norris, the plaintiff herein, was mentally incompetent and in support of this contention in the State of Michigan, we have the cases above referred to which clearly show that in this State the settled law holds that divorce proceedings commenced by an insane person are absolutely void, not voidable. There is nothing in the Wayne County Circuit Court record to show or indicate that Ralph A. Norris, the plaintiff herein, was ever adjudicated mentally competent or restored to his civil rights. If the decree was void in the first instance any subsequent action on the part of the defendant to obtain writs of attachment for support would not validate a law or an act which was already void from its inception. The record clearly indicates that the plaintiff herein, Ralph A. Norris, left the State of Michigan in the early part of 1926 and went to the State of Florida and

that subsequent thereto he went to the State of Arizona where he was committed in January, 1928, remained in the mental institution until June 22, 1928 when he returned to the State of Ohio. The record is silent as to when he came back into the State of Michigan between June 22, 1928 and October 19, 1928. This portion of the proceedings is revealed to show that the statutes of the State of Michigan required a two year residence at the particular time when this bill of complaint was filed. From the investigation now available through the Court records this plaintiff would only have had about four (4) months residence which was insufficient to confer jurisdiction on the Circuit Court in the County of Wayne and State of Michigan.

The defendant was precluded from giving any testimony before the Referee in the Friend of the Court's Office on the theory anything she would testify to was equally within the knowledge of the plaintiff, a mentally incompetent person. The testimony was taken before an assistant of the Friend of the Court acting as Referee. The plaintiff had the Friend of the Court act as Guardian Ad Litem, and another assistant Friend of the Court act as Attorney for the Guardian Ad Litem because the plaintiff is still in an insane asylum, see page 73 of Record. The defendant was precluded from giving any testimony regarding the mental condition by an attorney who was an interloper claiming to represent the interest of a third person who plaintiff is alleged to have married and divoced while mentally incompentent and after the divorce in question.

Wherefore petitioner prays that her petition for Writ of Certiorari be granted.

Elizabeth E. Norris,
Petitioner.

JOHN McINTOSH,
Attorney for Petitioner,
2305 Cadillac Tower,
Detroit 26, Michigan.

The decree being absolutely void, the law does not obligate defendant, Elizabeth Norris, to attack such an ineffective judgment. The law is clearly defined in *49 Corpus Juris Secundum, Judgments,* Section 449:

> "It is not necessary to take any steps to vacate or void a vested judgment; it may simply be ignored."

As previously stated, the divorce laws being purely statutory and there being no legal right on behalf of the plaintiff who had been adjudicated insane to file a bill of complaint for a divorce, the entire proceedings being void, the doctrine of laches would not and could not apply in this case.

RELIEF

The defendant and appellant, Elizabeth E. Norris, seeks to have the Supreme Court review the proceedings of the above entitled case by Writ of Certiorari and that the Court grant a petition for a Writ of Certiorari and the matter referred back to the Michigan Supreme Court with the direction to the subordinate Court to grant the petition for a rehearing and to set aside the divorce decree heretofore entered April 18, 1929 and permit petitioner

to submit the two letters from the Arizona State Hospital as evidence of the plaintiff's true mental condition when he was discharged and subsequently applied for divorce.

JOHN McINTOSH,
Attorney for Petitioner,
2305 Cadillac Tower,
Detroit 26, Michigan.

State of Michigan,
County of Wayne—ss.

Elizabeth E. Norris, being first duly sworn, deposes and says that she has read the foregoing petition for Writ of Certiorari and that the same is true of her own knowledge except as to matters therein stated to be on information and belief and as to those matters she believes it to be true.

John A. Comerford,
Notary Public, Wayne County, Michigan.
My commission expires September 8, 1957.

Paragraph 1:

The Michigan Supreme Court on March 9, 1955, being call Number 19, January, 1955 term, entered an opinion denying the defendant and appellant's appeal from an order denying defendant's petition to set aside a decree of divorce. On the 19th day of April, 1955, a petition for a rehearing was duly filed and submitted to the Court and on the 7th day of June, 1955 the Court entered an opinion denying the motion for rehearing which was duly attested to by the clerk of the Court on the 8th day of June, 1955. A copy of the record on appeal, the denial of the motion, the opinion of the Court, the record of the proceedings being duly attested to by the deputy clerk of the Michigan Supreme Court are made a part of these proceedings and filed separately with this Court.

APPENDIX

OPINION OF THE SUPREME COURT OF MICHIGAN

STATE OF MICHIGAN
SUPREME COURT

Ralph A. Norris,
Plaintiff and Appellee,
v.
Elizabeth E. Norris,
Defendant and Appellant.

Before the entire Bench.

Boyles, J.

This is an appeal from an order denying defendant's petition to set aside a decree of divorce. In October, 1928, plaintiff filed a bill of complaint for divorce in the circuit court for Wayne County. Personal service was had on the defendant, who appeared by attorney and filed an answer, later withdrawn by a stipulation of counsel which provided that the case might be heard pro confesso. A decree granting plaintiff a divorce was entered in April, 1929. It provided that the defendant have the custody of their minor children and that the plaintiff pay her $10 per week for their support.

In 1951 the defendant filed the petition involved here, to set aside the decree, the only ground alleged being "that the aforesaid plaintiff was a mentally incompetent person at the time the decree of divorce was entered and at the time his bill of complaint was filed." A hearing was held,

testimony taken, exhibits received, and the court entered an order denying the petition. The defendant appeals, claiming (1) that the court erred in granting the decree of divorce in 1929, lacking jurisdiction, and (2) again erred in 1953 in denying her petition to set aside the decree.

1. The record does not support appellant's claim that the laintiff was a mentally incompetent person at the time the bill for divorce was filed or when the decree was entered. On January 30, 1928, the plaintiff had been ordered admitted to the State asylum for the insane at Phoenix, Arizona, as an insane person. Ariz. Rev. Code 1928, ch. 35, §1769 (Ariz. Code Ann. 1939, art. 3, §8-301). On June 22, 1928, he was discharged from said hospital as improved and allowed to return to [sic] Ohio (Michigan?). Ariz. Rev. Code 1928, ch. 70, §2935 (Ariz. Code Ann. 1939, art. 2, §8-203). About 4 months later he filed his bill of complaint in the divorce case, October 19, 1928, and the divorce decree was entered April 18, 1929.

In a case referring to section 8-203, Arizona Code Annotated 1939, *supra,* the Arizona supreme court held that under this section the effect of a discharge *ipso facto* is to restore the person discharged to legal capacity to sue and to be sued. *Cubbison v. Cubbison,* 45 Ariz. 14 (40 P. 2d 86).

In the above case, the supreme court of Arizona made a distinction between proceedings for restoration to competency of persons placed under guardianship for reasons of insanity, and persons committed to the State asylum. The court held:

> "The order of February 8th adjudging her to be insane was made under the provisions of chapter 35, Revised Code of Arizona 1928 (section 1769 *et seq.).* * * *

> "Chapter 35, *supra*, as well as article 17 of chapter 88, Revised Code of Arizona 1928 (section 4107 *et seq.*), dealing with guardianship of minors and incompetents, were taken from California. * * * The effect of a discharge in either of such manners *ipso facto* restores the person discharged to legal capacity to sue and be sued."

The Arizona court pointed out that a commitment to the State hospital as an insane person under the statute was not an adjudication of mental incompetence, which would be a separate proceeding, under a different statute. In this State a like difference prevails between the statutory provisions for the admission of an insane person to a State hospital.* and the appointment of a guardian for one adjudged to be a mentally incompetent person.**

No other proof to sustain appellant's claim was offered and the record fails to show that the plaintiff was a mentally incompetent person when the bill was filed or the decree entered. No guardian was appointed by the Arizona court at the time of the comcitment of the plaintiff in 1928, and therefore the discharge of the plaintiff from the asylum in Arizona, under section 2935, *supra, ipso facto* restored him to legal capacity. The plaintiff, being temporarily in Arizona, that State had jurisdiction to adjudicate plaintiff's mental capacity. The plaintiff being therefore under no legal disability, and the defendant asserting no other jurisdictional defect, it must be concluded that the trial court did not lack the jurisdiction to grant the decree of divorce in 1928.

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*CLS 1952, §§330.21-330.23 (Stat. Ann. 1953 Cum. Supp. §§14.811-14.813).

**CL 1948, §703.1 (Stat. Ann. 1953 Cum. Supp. §27.3178[201]).

2. The court did not err in denying the instant petition to set aside the decree. Appellant was represented by counsel in the divorce proceeding. She has not denied the authority of her counsel to act. See *August v. Collins,* 265 Mich. 389. She is guilty of laches amounting to an equitable estoppel by her delay for more than 20 years before seeking to have the decree set aside. *Livingston v. Livingston,* 276 Mich. 399; *Hardy v. Hardy,* 326 Mich. 415. Furthermore, appellant repeatedly has accepted the benefit of the decree of divorce without questioning it. She remarried. On numerous occasions after the decree was granted she petitioned the court for attachments for the plaintiff's arrest for nonpayment of alimony, and on her petitions the plaintiff on 4 occasions was found guilty of contempt and sentenced to the Detroit House of Correction for nonpayment. She successfully resisted plaintiff's attempts to obtain custody of the children. One who thus accepts the benefits of a decree of divorce cannot be heard to question the jurisdiction of the court which rendered it. *Jackson City Bank & Trust Co. v. Fredrick,* 271 Mich. 538; *Newton v. Security National Bank of Battle Creek,* 324 Mich. 344.

Affirmed. Costs to appellee.

ORDER DENYING MOTION FOR REHEARING

STATE OF MICHIGAN
SUPREME COURT

Ralph A. Norris,
v.
Elizabeth E. Norris. } 46238

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the seventh day of June in the year of our Lord one thousand nine hundred and fifty-five.

Present the Honorable Leland W. Carr, Chief Justice, Henry M. Butzel, Talbot Smith, Edward M. Sharpe, Emerson R. Boyles, Neil E. Reid, John R. Dethmers, Harry F. Kelly, Associate Justices.

A motion for rehearing having been heretofore submitted herein, it is hereby denied, with costs to plaintiff.

State of Michigan—ss.

I, Hugh H. Carpenter, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 8th day of June in the year of our Lord one thousand nine hundred and fifty-five.

Hugh H. Carpenter,
Clerk.

(Seal)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.....

ELIZABETH E. NORRIS,
Defendant and Appellant,
vs.
RALPH A. NORRIS,
Plaintiff and Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the Supreme Court of the United States of America:

Your respondent, Ralph A. Norris, plaintiff and appellee, through his guardian *ad litem*, Hazen E. Kunz, respectfully requests that the application of the petitioner, Elizabeth E. Norris, for writ of certiorari in this cause be denied.

1. Defendant and appellant's appeal from an order denying defendant's petition to set aside a decree of divorce was denied by the Michigan Supreme Court on March 9, 1955. On June 7, 1955, defendant and appellant's petition for rehearing was denied by the same Court.

Therefore, defendant and appellant's application to the United States Supreme Court for writ of certiorari is untimely and should be denied.

2. The Supreme Court of Michigan made a finding that the record does not support defendant and appellant's claim that the plaintiff and appellee was a mentally incompetent person at the time of the filing of the bill for divorce or at the time of the granting of the decree of divorce.

> a. This Court resolved in *Maynard v. Hill*, 126 U. S. 190, that where a Court of one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizens concerning the marriage relation was repugnant to the due process clause of the constitution.

Therefore, the plaintiff and appellee prays that the defendant's petition for writ of certiorari be denied.

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